

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

Prosecution Response

to Defense Request to
File Ex Parte Supplement

8 March 2012

RELIEF SOUGHT

The prosecution in the above case respectfully requests the Court deny the defense request to file an ex parte supplement to its Motion to Compel.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense has the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. Rule for Courts-Martial (RCM) 905(c).

FACTS

On 14 February 2012, the defense submitted motions to the Court and the prosecution and stated that it had an ex parte supplement to its motion to compel. Enclosure 1.

On 23 February 2012, at the arraignment the Court asked the prosecution if it objected to the ex parte submission. Based on the above information, the prosecution had no objection to the defense ex parte submission. At the arraignment, the prosecution learned that it had not received emails from the Court and from the defense.

On 24 February 2012, the prosecution received the emails that it had not received from the defense and the Court between 14 and 23 February 2012. See enclosure 2.

In emails dated 15 February 2012, the Court requested and defense provided additional information regarding its ex parte supplement, as well as case law that purportedly supported their filing of the supplement. See enclosure 3. The email stated in relevant part:

5. The Defense, in unusual situations is entitled to an ex parte hearing to justify a motion for appropriate relief. United States v. Garries, 22 MJ 288, 291 (C.M.A. 1986) (recognizing the inherent authority in the military judge to permit an ex parte proceeding in the unusual circumstance where it is necessary to ensure a fair trial); United States v. Kaspers, 47 MJ 176 (C.A.A.F. 1997) (holding that a military judge has broad discretion to protect the rights of the military accused to include conducting an ex parte hearing). In the instant case, the Defense is not requesting an ex parte hearing. Instead, the Defense simply desires to present the Court with an ex parte supplement to its motion to compel discovery.

6. Due to the Government's refusal to provide the requested discovery, the Defense is placed in the position of having to disclose, to a partisan opponent, why it believes certain evidence is relevant and should be produced for trial. If the Defense is required to disclose its theory of relevance, the Government will receive an advance notice of the defense's theory and the opportunity to prepare to rebut and counter the requested discovery. The Government simply has to refuse to provide requested discovery in order to force the Defense to stand in open court and explain how each request is relevant and necessary. In meeting this challenge, the Defense is forced to explain why the requested discovery is needed, how the requested discovery is relevant to a fact in issue, and why the requested discovery is necessary to the Defense. In doing so, the Defense must balance how much of its trial strategy it will disclose to justify the production of the requested discovery. This mandated disclosure of the Defense's case theory provides an unfair advantage to the Government.

7. In order to avoid this unfair advantage, the Defense believes that this is one of those unusual situations where an ex parte hearing would be appropriate. United States v. Garries, 22 MJ 288, 291 (C.M.A. 1986); United States v. Kaspers, 47 MJ 176 (C.A.A.F. 1997).

Enclosure 3 (emphasis added).

The same day the prosecution received the above email, the prosecution emailed the Court and requested the opportunity to object. See enclosure 2.

WITNESSES/EVIDENCE

1. Email, Subject: Defense Motions, 14 Feb 12
2. Email, Subject: Email Issues, 24 Feb 12
3. Email, Subject: Government/Defense motions and arraignment, 15 Feb 12

LEGAL AUTHORITY AND ARGUMENT

The defense claims that it is unfair to require it to include a statement of relevance and necessity in their requests for production of evidence. See enclosure 3.

RCM 703(f)(3) states, "any defense request for the production of evidence . . . shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence."

To support its argument, the defense cites the unusual situations contemplated in United States v. Garries, 22 M.J. 288, 291 (CMA 1986) and United States v. Kaspers, 47 M.J. 176 (CAAF 1997).

In Garries, the defense alleged error because the trial court denied their request for funding for independent investigative assistance. 22 M.J. at 290. The defense refused to specify the reason for the requested funding and requested an ex parte hearing. Id. The judge denied the request for the funding, as the defense did not make a showing of necessity on the request. Id. at 290-91. The trial court also denied the request for an ex parte hearing. Id. at 290. While the Court recognized the inherent authority of the military judge to permit an ex parte proceeding in the unusual circumstance where it is necessary to ensure a fair trial, the Court noted that, by its very nature, an ex parte proceeding may provide undue advantage to one party. Id. at 291. The Court noted that “[u]se of an ex parte hearing to obtain expert services would rarely be appropriate in the military context” Id. Funding must be provided by the convening authority and an ex parte hearing “would deprive the Government of the opportunity to consider and arrange alternative for the requested expert services.” Id.; see also RCM 703(d).

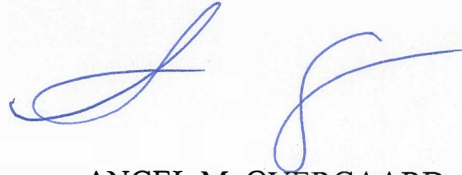
Similarly, in Kaspers, the defense alleged error because the trial court denied their request for funding to obtain their own expert. 47 M.J. at 179. The defense requested an ex parte hearing to justify their request for their own expert at government expense. Id. The judge denied the ex parte hearing, ruling that the defense had to state their justification in open court. Id.; see also RCM 703(d). The defense stated their reasons on the record and the judge ordered the funding of the defense expert. Id. The Court reiterates that while an ex parte hearing can be allowed in unusual circumstances, the trial court did not abuse its discretion by determining that an ex parte hearing was not necessary. Id. at 180. In making its determination, the Court acknowledged that “our rule may burden the defense to make a choice between justifying necessary expert assistance and disclosing valuable trial strategy.” Id. The Court noted, however, that “the defense is not without a remedy,” and, in this case, the defense was able to make a preliminary showing of necessity on the record without revealing the allegedly privileged information which served as the basis for his ex parte request. Id. at 180-81.

In both cases, the Court found that the trial courts had not abused their discretion in denying ex parte hearings. Both cases acknowledge that unusual circumstances exist that may justify ex parte proceedings; however, neither case included those unusual circumstances. The case at bar also does not reveal an usual circumstance that would require an ex parte disclosure of information. The defense’s explanation email makes clear that the defense is claiming RCM 703(f)(3) is unfair and are trying to avoid the requirements of the rule. The defense contemplates no usual circumstance, such as disclosing the defense’s theory on how the defense is going to use information or disclosing privileged information. The defense should not receive the benefit of an ex parte filing without any justification.

Finally, this request is premature. The defense has not even attempted to make a preliminary showing of relevance and necessity to the Court under RCM 703(f)(3) before requesting an ex parte motion.

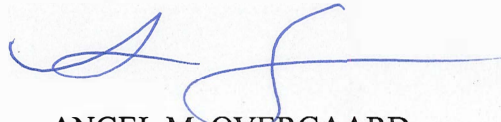
CONCLUSION

The defense has provided no unusual circumstance which would support its request to circumvent RCM 703(f)(3) and file an ex parte supplement. The defense request, therefore, should be denied.

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ANGEL M. OVERGAARD
CPT, JA
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Defense Counsel,
via electronic mail, on 8 March 2012.

A handwritten signature in blue ink, identical to the one above, consisting of a stylized 'A' followed by a horizontal line and a loop.

ANGEL M. OVERGAARD
CPT, JA
Trial Counsel